

U.S. FREEDOM OF NAVIGATION OPERATIONS AND PAKISTAN - LEGALITY UNDER INTERNATIONAL LAW AND GEOPOLITICAL IMPLICATIONS

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ABSTRACT

The United States has been using its Freedom of Navigation Program to challenge interpretations and reservations of various states with regards to the United Nations Convention on the Law of Seas. This article assesses the credibility of these operations under International Law from the perspective of South Asian states, namely Pakistan, China, and India.

The article begins by introducing the Convention on the Law of Seas and reservations made to this Convention by South Asian states. It then uses FONOPs data for the past three decades to highlight the U.S. stance on interpretations of the Convention on the Law of Seas. The article then examines the reservations and state practice of the South Asian States to build a case for a regional custom in favour of seeking prior permission before conducting war manoeuvres in the EEZ and territorial waters.

Finally, the paper explores the possible geo-political consequences of continued U.S. FONOPs in the Indian Ocean considering the future U.S.-China battle for global supremacy.

On April 7th 2021, the United States' Navy carried out a Freedom of Navigation Operation (FONOP) in the Indian Ocean, in waters that fall

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within India's Exclusive Economic Zone (EEZ).²⁰⁹ According to the Press Release by the Commander of the U.S. 7th Fleet, the purpose of this operation was to reassert the United States' interpretation of the "rights, freedoms, and lawful uses of the sea recognized in International Law."²¹⁰ Commentators in India called the move an unnecessary violation of Indian laws,²¹¹ unbecoming of a strategic partner, with the aim of sending a message to China.²¹² The Indian Ministry of External Affairs (MEA) responded by stating that it had "conveyed its concerns regarding this passage through our EEZ to the government of the U.S.A through diplomatic channels."²¹³ Those in Pakistan, meanwhile, saw it as a symbol of the limitations of the Indo-U.S. partnership, as well as the fraying of Indo-U.S. ties.²¹⁴ However, despite the outrage in India and wishful thinking on the part of Pakistan, the reality is that the United States has been conducting and publicizing FONOPs in the Indian Ocean since 1992,²¹⁵ with the most recent one (prior to April 2021)

²⁰⁹ Smith JM, "America and India Need a Little Flexibility at Sea" (Foreign Policy January 1, 8796) <<https://foreignpolicy.com/2021/04/15/us-india-fonop-maritime-law/>> accessed October 1, 2021

²¹⁰ "7th Fleet Conducts Freedom of Navigation Operation" (Commander, U.S. 7th Fleet April 7, 2021) <<https://www.c7f.navy.mil/Media/News/Display/Article/2563538/7th-fleet-conducts-freedom-of-navigation-operation/>> accessed October 1, 2021

²¹¹ "U.S. Navy Ship Violates Indian Law as It Sails through Exclusive Economic Zone messaging China" (The Print April 9, 2021)

<<https://theprint.in/defence/us-navy-ship-violates-indian-law-as-it-sails-through-exclusive-zone-in-messaging-to-china/636880/>> accessed October 1, 2021

²¹² Krishnan A, "India, U.S. Not on Same Page on Rules-Based Order" (The Hindu April 10, 2021) <<https://www.thehindu.com/news/international/india-us-not-on-same-page-on-rules-based-order/article34289711.ece>> accessed October 1, 2021

²¹³ Unnithan S, "Why Is the U.S. Navy in India's Backyard?" (India Today April 12, 2021) <<https://www.indiatoday.in/india-today-insight/story/why-is-the-us-navy-in-india-s-backyard-1789264-2021-04-09>> accessed October 1, 2021

²¹⁴ Sans' and others, "How U.S. Navy Exposed the Limits of Indo-U.S. Strategic Cooperation" (Global Village Space April 10, 2021)

<<https://www.globalvillagespace.com/how-us-navy-exposed-the-limits-of-indo-us-strategic-cooperation/>> accessed October 1, 2021

²¹⁵ "Department of Defense Report to Congress" (January 1993)

<<https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY1992%20DOD%20Annual%20FON%20Report.pdf>> accessed October 1, 2021

taking place in 2019.²¹⁶ This is also true for Pakistan where FONOPs have been conducted in Pakistan's territorial waters and EEZ since 1992.²¹⁷

While a lot has been written about U.S. FONOPs in recent years, most of this scholarship has focused on operations in the South China Sea and their geopolitical implications vis-à-vis China. As a result, there is a key research gap in this area concerning the analysis of U.S. FONOPs in South Asia under the lens of International Law which this paper seeks to fill.

This article will analyse the legality of the U.S. FONOPs under the United Nations Convention on the Law of the Sea (UNCLOS) in the specific context of Pakistan and South Asia. It presents a historical background of the development of UNCLOS before introducing the UNCLOS and its provisions relevant to analyse the legality of FONOPs. It then considers the respective stances taken by South Asian states with regards to FONOPs conducted by the U.S. This is followed by a detailed analysis of the legality of FONOPs under UNCLOS, focusing on the fact that Pakistan, India, and China require that prior permission be taken by foreign warships entering their territorial waters. The U.S. outrightly refuses to abide by this requirement. This paper argues that the U.S. is in violation of both international law and a regional custom in doing so. Lastly, it concludes by exploring the potential geopolitical implications of continued FONOPs in the Indian Ocean.

²¹⁶ Ibid

²¹⁷ Ibid

1. HISTORICAL BACKGROUND

Water bodies have always played an important role in societal and economic growth. However, for most of history, human activity was restricted to internal and coastal waters. It was not until the 15th century when advances in seafaring and ship-building technologies, coupled with the European desire for colonial settlements, led to regular expeditions across oceans.²¹⁸ This led to a practice whereby certain states started claiming sovereignty over parts of the ocean. This doctrine came into question following the 1603 Dutch capture of the Portuguese ship *Santa Catarina* along the Singapore Straits.²¹⁹ Following this event, the Dutch jurists Hugo Grotius and Cornelius Bynkershoek theorised that “a ruler or king could not claim territorial boundary at sea greater than he was capable of defending from land.”²²⁰ Grotius’ work, *Mare Liberum*, came to be regarded as the theoretical bedrock of the concept of freedom of the seas which would subsequently develop into an international custom.

With the passage of time and advancements in technology, states developed an even greater capacity to explore the oceans as well as ocean beds. Consequently, there was significant confusion in what laws applied to international maritime interactions. Owing to this confusion, Malta’s Ambassador to the United Nations advocated for the codification of a

²¹⁸ “The Age of Discovery,” *Dive & Discover* (blog), accessed October 21, 2021, <https://divediscover.who.edu/history-of-oceanography/the-age-of-discovery/>

²¹⁹ Van Ittersum, M.J., “Hugo Grotius in Context: Van Heemskerck’s Capture of the *Santa Catarina* and its Justification in *De Jure Praedae*” (Brill 1st Jan 2003) <<https://doi.org/10.1163/156853103322895360>> accessed October 1, 2021

²²⁰ Walsh, D., “Sovereignty over Sea” (1972) *Pakistan Horizon*, Pakistan Institute of International Affairs, <<https://www.jstor.org/stable/41393124>> accessed September 18, 2021

Convention on this subject in 1967.²²¹ After over a decade of negotiations and efforts, in October 1982, the United Nations Convention on the Law of Seas (UNCLOS)²²² was formulated and opened for signature and ratification at Montego Bay, Jamaica.²²³

The UNCLOS offered some theoretical clarity in the regulation of seas and oceans. However, subjective interpretations of the UNCLOS resulted in varied practices by states and practical confusion with regards to territorial control, baselines, and jurisdictional boundaries.²²⁴ In this regard, the United States, despite being non-signatory to the UNCLOS, has routinely sought to enforce its own legal interpretation of the freedom of the oceans. In the process, it has taken upon itself to challenge claims it felt had adverse impacts on maritime freedom of movement.²²⁵ As a result, it launched the Freedom of Navigation Programs (FONOPs), which included innocent passages of U.S. warships through jurisdictional boundaries that the U.S. thought were against the U.S. interpretation of legal norms of the oceans.²²⁶ The U.S. stance is based on the principle to “not acquiesce in unilateral acts of other states

²²¹ Becker M, “The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea” (2005) 46 *Harvard International Law Journal* <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/hilj46&div=8&id=&page=>> accessed September 18, 2021

²²² “United Nations Convention on the Law of the Sea” (*United Nations Organisation* 1998) UNTS: 31363 Volume 1883 (p3) Art. 3-4 <https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed September 18, 2021

²²³ *Ibid*

²²⁴ Aceves WJ, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 *Naval War College Review* 59 <https://www.jstor.org/stable/44642450?seq=2#metadata_info_tab_contents> accessed September 18, 2021

²²⁵ *Ibid*

²²⁶ 2017 (Freedom of Navigation (FON) Program)

designed to restrict the rights and freedoms” with regards to the high seas.²²⁷ Furthermore, the U.S. Department of Defence stated that freedom of seas means “all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law.”²²⁸

2. RELEVANT PROVISION OF UNCLOS

The UNCLOS is the most significant international document when it comes to governing maritime activity. It is ratified by 167 countries. This section covers relevant details regarding UNCLOS in two sections. The first part explores territorial divisions specified in the Convention, whereas the second section touches upon the positions of Pakistan, India, China, and the United States regarding certain clauses of the convention.

2.1 Territorial Boundaries

According to the UNCLOS, specific boundaries have been provided for each state to define the business, commercial, economic, and military activity taking place in the seas. The following are five territorial zones in the UNCLOS.

²²⁷ “Statement on the United States Oceans Policy”

<<https://www.jag.navy.mil/organization/documents/Reagan%20Ocean%20Policy%20Statement.pdf>> accessed September 18, 2021

²²⁸ Odom, J.G, “How the U.S. FON Program is Lawful and Legitimate” (2015) Asia Maritime Transparency Initiative <<https://amti.csis.org/how-the-u-s-fon-program-is-lawful-and-legitimate/>> accessed September 18, 2021

2.1.1 Territorial Sea²²⁹

The first is the territorial sea which can be defined as the area that extends 12 nautical miles from the baseline of a country's coast. This part of the sea is under the complete jurisdiction of the coastal state linked to it. While foreign ships are allowed innocent passage through this area, a coastal state can exercise its jurisdiction and intervene if any kind of activity in the territorial sea has adverse effects on the state, including a threat to the peace and stability of the state. The state can also intervene for reasons of drug control and traffic control.

2.1.2 Contiguous Zone²³⁰

The Contiguous Zone is the belt that extends 12 nautical miles beyond the territorial sea. A coastal state has more limited control over this area in that it can only intervene if actions are infringing the customs, fiscal and immigration laws of the coastal state. It can also act if any activity in the Contiguous Zone threatens the regulation and governance of the territorial sea.

2.1.3 Exclusive Economic Zone²³¹

The Exclusive Economic Zone (EEZ) extends 200 nautical miles from the baseline of the coastal state. It includes both the Territorial Sea and the Contiguous Zone and extends beyond them as well. The coastal state has

²²⁹ “United Nations Convention on the Law of the Sea” (*United Nations Organisation* 1998) UNTS: 31363 Volume 1883 (p3) Art. 3-4
<https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed September 18, 2021

²³⁰ “United Nations Convention on the Law of the Sea” Art. 33

²³¹ “United Nations Convention on the Law of the Sea” Art. 55, 57

complete control over all economic activity happening in this region, including fishing, mining, oil exploration, and marine research. The coastal state has regulatory jurisdiction over this land regarding the protection and preservation of natural resources and the marine ecosystem.

2.1.4 Continental Shelf²³²

The continental shelf is an area which has an outer limit of 350 nautical miles from the coastal baseline or must not exceed 100 nautical miles from the 2500 meters isobath. Coastal states whose baseline is linked to this area can exercise exclusive rights for exploring and exploiting its natural resources including rights to authorize and regulate the drilling of the shelf for all mining, oil exploration and research purposes.

2.1.5 High Seas²³³

The last territorial jurisdiction specified in the UNCLOS are the High Seas. These are parts of the sea that are not included in the Exclusive Economic Zone, territorial sea, or the internal waters of any country. High seas are open to all states for freedom of navigation, freedom of overflight, freedom of constructing artificial islands, freedom of fishing and freedom of scientific research. Although the high seas are reserved for free navigation, there are certain provisions that prohibit activity with regards to the slave trade, piracy, seizure of ships, trafficking, unauthorized broadcasting, and the illicit narcotics trade.

²³² “United Nations Convention on the Law of the Sea” Art. 76

²³³ Ibid

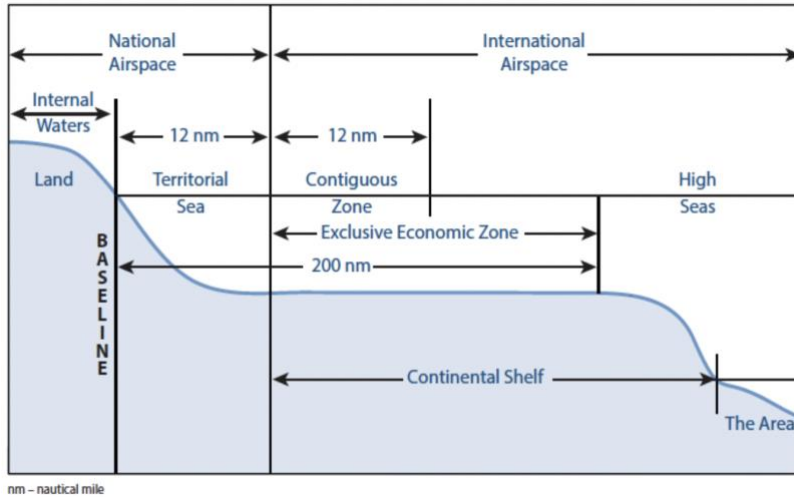


Figure 1: Legal Boundaries of the Ocean²³⁴

2.2 State Narratives about UNCLOS provisions relevant to FONOPs

As this paper focuses on the legality of FONOPs in the Indian Ocean from the perspective of South Asian coastal states, this section will only present the state narratives of Pakistan, India, China, and U.S.²³⁵

²³⁴ See generally “Chapter 2: Maritime Zones” (*Law of the Sea*)

<<https://sites.tufts.edu/lawofthesea/chapter-two/>> accessed September 18, 2021

²³⁵ “United Nations Treaty Collection” (*United Nations*)

<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed September 18, 2021

2.2.1 Pakistan

Pakistan ratified the UNCLOS with a few reservations. It reserved the right to make declarations to article 287 and 298 of the treaty at any time.²³⁶ It also

²³⁶ Article 287 - Choice of Procedure

1. When signing, ratifying, or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 298 - Optional Exceptions to applicability of Section 2

1. When signing, ratifying, or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to

sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any

declared that it would not, in any way, authorize the carrying out of military exercises or manoeuvres by other states in territorial seas, without the consent of the relevant coastal state.

2.2.2 India

India also ratified the UNCLOS with similar declarations. These included the right to make appropriate declarations for articles 287 and 298 at any time.²³⁷

Like Pakistan, India also interpreted UNCLOS provisions in a way to not

unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the expected category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an expected category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

²³⁷ UNCLOS Article 287, 298

authorise military exercises or manoeuvres in the exclusive economic zone and on the continental shelf without the permission of the coastal state.

2.2.3 China

China has also ratified the UNCLOS while presenting certain declarations to several its provisions. China reaffirmed that innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships. China also recognized and reaffirmed its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone.²³⁸

2.2.4 United States of America²³⁹

The United States took part during the negotiations of the UNCLOS; however, it later did not ratify the Convention and therefore is not a party to it or legally bound by any of its provisions which do not represent customary law. The U.S. stance was based on its interpretation of the deep seabed mining provisions of the treaty, which it felt were “contrary to the interests and

²³⁸ The Constitution of the People's Republic of China (1982), The State Council People's Republic of China Art. 2
<https://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html>

Article 2 - Sovereignty

- (1) All power in the People's Republic of China belongs to the people.
- (2) The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels.
- (3) The people administer state affairs and manage economic, cultural, and social affairs through various channels and in various ways in accordance with the law.

²³⁹ “Statement on the United States Oceans Policy”
<<https://www.jag.navy.mil/organization/documents/Reagan%20Ocean%20Policy%20Statement.pdf>> accessed September 18, 2021

principles of industrialized nations and would not help attain the aspirations of developing countries.”²⁴⁰ Despite the fact that U.S. concerns, as well as those of other industrialized states, were addressed in the form of revisions before the treaty finally came into force in 1994, the U.S. has still not ratified it. However, the U.S. considers certain provisions of the UNCLOS, especially the one relating to territorial boundaries and rights to freedom of navigation customary provisions of international law.

3. FREEDOM OF NAVIGATION OPERATIONS

Having discussed the territorial divisions as prescribed in the UNCLOS as well as the stance of relevant states in relation to it, this section discusses U.S. Freedom of Navigation Operations (FONOPS). It considers at length the origins, legal basis, and history of these operations.

3.1 U.S. Freedom of Navigation Operations - History and Purpose

A few years after World War II, the United States started an informal program to “protect and promote the rights and freedom of navigation and overflight guarantee to all nations under international law”.²⁴¹ This program may have had its ideological underpinnings in Woodrow Wilson’s ‘Fourteen Points.’ Wilson presented his ideas in an address to the U.S. Congress in January 1918, at a time when the world was going through the First World War. He argued that his fourteen points were the only way to ensure ‘enduring peace’ in the world. One of these points highlighted that enduring peace would only be possible in the presence of “absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be

²⁴⁰ Ibid

²⁴¹ Aceves WJ, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 Naval War College Review 59

closed in whole or in part by international action for the enforcement of international covenants.”²⁴² Using this program, U.S. marine forces challenged restrictions on the innocent passage of military and commercial vessels and other maritime claims that the U.S. thought to be excessive, impermissible, impartial, and unnecessary under international law. By 1979, this informal program was formally established by the Jimmy Carter administration under the name “Freedom of Navigation Program.”²⁴³

The purpose of this program was summarized in the communications between the U.S. Commander in Chief, U.S. Atlantic Command and naval units of a fleet allocated to conducting FONOPs.²⁴⁴ The U.S. maritime policy had the objective of protesting.

1. all territorial claims in excess of twelve nautical miles especially those overlapping an international navigation straight;
2. all claims inhibiting navigation over water that the U.S. considered to be the high seas;
3. all claims requiring advance notification of warships;
4. rules for innocent passage through territorial seas which were substantially different from established provisions; and

²⁴² “Wilson’s Fourteen Points” (1918) Library of Congress
<<https://www.loc.gov/collections/world-war-i-rotogravures/articles-and-essays/events-and-statistics/wilsons-fourteen-points/>> accessed on September 20, 2021

²⁴³ 2017 (Freedom of Navigation (FON) Program)

²⁴⁴ “Aceves WJ, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 Naval War College Review 59

5. assertion of jurisdiction over navigation and overflight beyond the territorial sea.²⁴⁵

The U.S. use of military conduct to assert their interpretation of international law is complemented by diplomatic conduct which is also an integral part of this program.²⁴⁶ Collectively, this program manages to have a unique combination of military and diplomatic antagonism that is not formally seen in any other country of the world.²⁴⁷ It also forms U.S. state practice and *opinio juris* as regards to its interpretation of the law of the sea.

The FONOPs have developed into an integral part of the U.S foreign policy.²⁴⁸ Their importance was codified in the U.S. Ocean Policy of 1983, which stated that the U.S would protect its rights, freedoms and uses of the sea in a consistent manner with a proper balance of interests.²⁴⁹ Here it is relevant to understand that as a non-signatory of the UNCLOS, the U.S. also used these FONOPs to choose practices they would abide by, and practices they would not accept. Essentially, these operations helped the U.S develop a trend of state practice and attain the status of a persistent objector to other regional and country-specific customs, thus formulating an uncodified, non-negotiated and self-developed legal regime for the U.S., which stands apart from the UNCLOS.²⁵⁰

²⁴⁵ Ibid

²⁴⁶ “The U.S. Freedom of Navigation Program” (*The National Bureau of Asian Research (NBR)* January 11, 2021) <<https://www.nbr.org/publication/the-u-s-freedom-of-navigation-program/>> accessed September 18, 2021

²⁴⁷ Aceves WJ, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 *Naval War College Review* 59

²⁴⁸ Ibid 40

²⁴⁹ Ibid

²⁵⁰ Aceves WJ, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea” (1993) 46 *Naval War College Review* 59

3.2 The Legal Terms underpinning FONOPs

Before addressing the question of the legality of FONOPs, it is imperative to understand the legal doctrines that underpin these operations. These include the freedom of the high seas, the right to innocent passage, and the right to coastal defence given in UNCLOS. It is important to mention here that these rights will only be used in this analysis because they will form the foundation of the next section which investigates the legality of U.S FONOPs conducted in South Asia. These rights are also customary provisions of international law; hence, they hold binding significance for the U.S, although it has not signed the UNCLOS.

3.2.1 Freedom of Navigation

Freedom of Navigation is a customary principle of the Law of the seas, which quite literally suggests that ships flying the flag of any sovereign state shall not suffer any interference from other states.²⁵¹ This principle is applicable to the High Seas, where there is no regulatory jurisdiction of any state. Hence, a FONOP conducted in the High Seas would be legal under the Law of Seas and the customs of international law.²⁵²

3.2.2 Right to Innocent Passage

While the principle of freedom of navigation applies to the high seas, the right to innocent passage allows ships to navigate through the Exclusive Economic Zone or the Territorial Waters of coastal states. This right is enshrined in Article 17 of the UNCLOS which states that “ships of all States, whether

²⁵¹ Bateman S, “Freedom of Navigation and the Law of the Sea” (*Policy Forum* January 20, 2020) <<https://www.policyforum.net/freedom-of-navigation-and-the-law-of-the-sea/>> accessed September 18, 2021

²⁵² UNCLOS Art. 45

coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. However, this right is subject to certain rules and regulations.

Article 18 further explains the meaning of innocent passage under the UNCLOS.²⁵³ According to this provision, “passage” qualifies as:

“navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.”²⁵⁴

This Article also denotes that passage must be “continuous and expeditious” and can include stopping and anchoring if it is incidental to the danger, distress, or emergency of ordinary navigation. Alongside Article 18, Article 19 further extends the concept of “innocent passage”, providing a list of actions that a ship availing innocent passage must not undergo. According to Article 19,

“1. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

²⁵³ UNCLOS Art. 18, 19

²⁵⁴ UNCLOS Art. 18

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; and

(l) any other activity not having a direct bearing on passage.”²⁵⁵

3.2.3 The Right to Coastal Defence

Apart from the criterion prescribed in Article 19, a ship undergoing innocent passage is also subject to the regulations of a coastal state especially when passing through its territorial waters. This is known as the right to coastal protection.²⁵⁶ According to the Convention, a coastal state is permitted to pass laws and regulations related to the passage through territorial sea for any the following objectives: 1) Safety of Navigation and Regulation of maritime traffic, 2) the protection of navigational aids and facilities and other facilities or installations; 3) the protection of cables and pipelines; 4) the conservation of the living resources of the sea; the prevention of infringement of the fisheries laws and regulations of the coastal State; 5) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; Marine scientific research and hydrographic surveys; 6) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; 7) prevention of collisions at sea including the use of designated sea lanes and traffic separation schemes; 8) and to require ships carrying nuclear material to observe certain precaution.²⁵⁷

This means that all ships conducting FONOPs in the territorial seas of coastal states must abide by the rules and regulations imposed by the relevant coastal states to ensure that they are deemed legal under international law.

²⁵⁵ UNCLOS Art. 19

²⁵⁶ “Chapter 3: Freedom of Navigation” (*Law of the Sea*)

<<https://sites.tufts.edu/lawofthesea/chapter-three/>> accessed September 18, 2021

²⁵⁷ United Nation Convention on the Law of the Sea 1982

3.2.4 U.S. Freedom of Navigation Operations to counter Pakistani, Indian, and Chinese interpretations and claims

Over the years, the United States has used its interpretation of the legal terms mentioned in the previous section to challenge the claims and interpretations of several states. This section looks at a history of U.S. FONOPs conducted to challenge Pakistani, Indian and Chinese interpretations of UNCLOS.

The following tables present data from 1992 - 2020 on the FONOPs mentioned above, as well as the rationale given by the U.S. for each operation.²⁵⁸

U.S. FONOPs conducted in Pakistani Territorial Sea and Exclusive Economic Zone	
Year	Pakistani stance challenged by the U.S.
1992	Prior Permission for warships to enter 12nm territorial sea
1996	Prior permission for warships to enter territorial sea
1998	Claim of security zone - excessive restrictions on military activities in the EEZ
1999	Excessive use of straight baselines in defining waters in which it has maritime rights.
2016	Prior permission for warships to perform manoeuvres in EEZ

²⁵⁸ “DoD Annual Freedom of Navigation (FON) Reports,” (Department of Defence, United States Government), <<https://policy.defense.gov/ousdp-offices/fon/>> accessed August 11th, 2021

2018	Prior consent required for military exercises or manoeuvres in the exclusive economic zone. [Declaration upon Ratification of the 1982 Law of the Sea Convention, Feb. 26, 1997.]
2019	Prior consent required for military exercises or manoeuvres, particularly those involving the use of weapons or explosives, in the exclusive economic zone. [Declaration upon Ratification of the 1982 Law of the Sea Convention, June 29, 1995.]

U.S. FONOPs conducted in Indian Territorial Sea and Exclusive Economic Zone	
Year	Indian stance challenged by the U.S.
1992	Prior permission for warship to enter 12nm territorial sea
1993	Claim over Gulf of Mannar between India and Sri Lanka; Prior Permission for warships to enter the 12nm territorial sea.
1994	Prior Permission for warships to enter the 12nm territorial sea; Claim over Gulf of Mannar between India and Sri Lanka.
1996	Permission required for warships to enter the territorial sea.
1997	Permissions for warships to enter the territorial sea.
1999	Prior permission before entering territorial waters, military manoeuvres and exercises, historic claim over the strait of Mannar.
2003	India 24nm security zone and to have authorization for warships to enter the territorial zone.
2007	Requirement of permission for military manoeuvres in its EEZ.

2008	Requirement of permission for military manoeuvres in its EEZ.
2009	Requirement of permission for military manoeuvres in its EEZ.
2010	Authorization required for military manoeuvres in the EEZ.
2011	Prior notification required for foreign warships to enter territorial sea and archipelagic waters.
2012	Authorization required for military manoeuvres in the EEZ.
2013	Authorization required for military manoeuvres in the EEZ.
2014	Authorization required for foreign military exercises or manoeuvres in the EEZ.
2015	Prior consent required for military exercises or manoeuvres in the EEZ.
2016	Prior consent required for military exercises or manoeuvres in the EEZ.
2017	Prior consent required for military exercises or manoeuvres in the EEZ.
2019	Prior consent required for military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the exclusive economic zone. [Declaration upon Ratification of the 1982 Law of the Sea Convention, June 29, 1995.]

U.S. FONOPs conducted in Chinese Territorial Sea and Exclusive Economic Zone	
Year	Chinese stance challenged by the U.S.
1992	Prior Permission for warships to enter the 12nm territorial sea.
1993	Prior Permission for warships to enter the 12nm territorial sea.
1994	Prior permission for warships to enter the 12nm territorial sea.
1996	Prior permission for warships to enter the 12nm territorial sea.
2000	The U.S. challenged Taiwan's excessive use of straight baselines in defining waters.
2007	Criminalization of foreign surveys in the EEZ.
2008	Criminalization of foreign surveys in the EEZ.
2009	Criminalization of foreign surveys in the EEZ.
2011	Prior permission required for innocent passage of foreign military ships through the territorial sea.
2012	Prior permission required for innocent passage of foreign military ships through the territorial sea.
2013	Excessive straight baselines; security jurisdiction in contiguous zone; jurisdiction over airspace above the exclusive economic zone (EEZ); domestic law criminalizing survey activity by foreign entities in EEZ; prior permission required for innocent passage of foreign military ships through territorial sea.

2014	Excessive straight baselines; jurisdiction over airspace above the EEZ; restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity by foreign entities in the EEZ.
2015	Excessive straight baselines; jurisdiction over airspace above the Exclusive Economic Zone (EEZ); restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity by foreign entities in the EEZ; prior permission required for innocent passage of foreign military ships through the TTS.
2016	Excessive straight baselines; jurisdiction over airspace above the EEZ; restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity by foreign entities in the EEZ; prior permission required for innocent passage of foreign military ships through the TTS.
2017	Excessive straight baselines. Domestic law criminalizing survey activity by foreign entities in the EEZ.
2018	Straight baselines not drawn in accordance with the law of the sea. [Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, May 15, 1996.] Domestic law criminalizes survey activity by foreign entities in the exclusive economic zone. [Order No. 75, Surveying and Mapping Law, Dec. 2002.] Prior permission required for innocent passage of foreign military ships through the territorial sea. [Declaration upon Ratification of 1982 Law of the Sea Convention, June 7, 1996.] Actions and statements that indicate a claim to a territorial sea around features not so entitled (i.e., low-tide elevations).

2019	<p>Straight baseline claims. [Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, May 15, 1996.]</p> <p>Criminalization of survey activity by foreign entities in the exclusive economic zone. [Order No. 75, Surveying and Mapping Law, Dec. 2002.]</p> <p>* Security jurisdiction over the contiguous zone. [Law on the Territorial Sea and Contiguous Zone, Feb. 1992.]</p>
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4. LEGALITY OF U.S. FREEDOM OF NAVIGATION OPERATIONS

Having established an understanding of the legal terms that underpin the U.S. FONOPs, as well as the stance taken by the United States in conducting these operations, one can move on to addressing the question of legality of these operations. There are two legal questions to be addressed in this regard:

1. Whether the declarations made by Pakistan, India and China constitute a regional custom
2. Whether the United States is in violation of International Law

4.1 Do the stances of Pakistan, India, and China constitute a regional custom?

According to the International Court of Justice in the *North Sea Continental Shelf* Case, customary international law consists of two aspects: 1) state practice and 2) *opinio juris* or general practice accepted by law.²⁵⁹

²⁵⁹ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, p.3, ICJ, 20 February 1969

State practice requires, especially for a regional custom, that many states in the region abide by the principle, and that the practice has been followed over a long time. For the practice of requiring prior permission before performing war manoeuvres in territorial seas and Exclusive Economic Zone, we see that in addition to Pakistan, India and China, other states like Bangladesh and Iran also have a similar stance. Moreover, this principle has been followed by Pakistan, India, and China since their inception, and was also expressed as a reservation during the ratification of the UNCLOS by all states.²⁶⁰

The second aspect of custom is *opinio juris* which means that practice must be accompanied by the belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The requirement of prior approval before performing warship manoeuvres in the territorial seas and exclusive economic zones must assert a legal duty on other states. An indication that this is in fact believed to be a legal duty can be inferred from the declarations made by each of the coastal states under discussion, as well as states like Bangladesh and Iran to the UNCLOS. These declarations, very similar in their wording, had the objective of specifying that each of these coastal states required as per legal obligation prior permission by a foreign ship before performing war manoeuvres in their territorial waters and exclusive economic zone.

It is also essential to understand the concept and prevalence of regional customs under International Law. Regional or special customs can be described as practices that concern a smaller number of states. These deal

²⁶⁰ Hakapää K, "Oxford Public International Law," *Max Planck Encyclopaedia of Public International Law (MPEPIL)* (Oxford University Press 2013)
<https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_Innocent_Passage.pdf>
> accessed September 18, 2021

with non-generalizable topics such as the entitlement of a certain right within a limited geographical space or rules relating to countries of a specific region. The idea of regional customs was officially recognized by the ICJ in the case between Columbia and Peru on diplomatic asylum.²⁶¹ Although in this case Columbia had failed to sufficiently prove in the court that there existed a Latin-American custom on granting diplomatic asylum, the court recognized the concept of regional customs and their legal significance, if proven.²⁶²

According to the diplomatic asylum case between Columbia and Peru, it is only required that parties establish such a regional custom in a manner that it becomes binding on other states. This idea resurfaced during the Rights of Nationals of U.S.A in Morocco case where in response to a special question in front of the court with regards to the capitulatory rights of Americans in Morocco, the court restated its reasoning that a regional custom must be 'general practice accepted as law.'²⁶³ Although, in this case the court did not find the presence of a regional custom, the concept was still acknowledged and was given due recognition as a source of law under Article 38 of the ICJ statute.²⁶⁴

These cases explain that the ICJ has recognized the presence of regional customs, however, the threshold to prove a practice as a regional custom is rather strict and high. Therefore, it is pertinent to include instances where the existence of a regional custom has been accepted under International Law. The foremost amongst these is the case of Right to Passage over Indian

²⁶¹ Anthony D'Amato, "The Concept of Special Custom in International Law" (American Political Science Association) <<https://www.researchgate.net/publication/33824113>> accessed September 18, 2021

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Ibid

Territory between Portugal and India.²⁶⁵ In this case, the ICJ found the presence of a regional custom between Portugal and India based on the time duration, uniformity, and certainty in the state practice with regards to the legal activity in question.²⁶⁶

We also see an acknowledgement of the existence of a regional custom in the question of whether the European Commission had the jurisdiction over navigation of the river from Galatz to Braila. The court opined that a special custom specific to the region existed as the juridical force had been used for considerable time and the states had unanimously consented to the jurisdiction.²⁶⁷ Lastly, the Anglo-Norwegian Fisheries case is another precedent worth analysing. The dispute began when the question arose of how much water surrounding Norway was Norwegian, meaning the territory where Norway had the exclusive right to fishing.²⁶⁸ While deciding whether the delimitations of sea area by Norway were in accordance with international law, the court found that the 10-mile rule was not applicable to Norway since it had always opposed such a general rule. The court also recognized that through Decrees, Norway had clearly shown that straight line delimitations of sea area was a state practice that had been established over a long time, hence should be recognized as a regional custom.²⁶⁹ Hence, this was not considered contrary to international law. The court also reasoned the

²⁶⁵ *Right of Passage over Indian Territory (Port v India)* [1960] World Court (International Court of Justice)

²⁶⁶ Anthony D'Amato, "The Concept of Special Custom in International Law" (American Political Science Association) <<https://www.researchgate.net/publication/33824113>> accessed September 18

²⁶⁷ *Ibid*

²⁶⁸ *Fisheries Case* [1951] World Court (International Court of Justice), <<https://www.icj-cij.org/public/files/case-related/5/1811.pdf>> accessed September 18, 2021

²⁶⁹ *Ibid*

economic importance behind this practice as an influential consideration for the utility of such a practice.²⁷⁰

The judgments highlighted above provide an insight into the emergence of regional custom, as well as its significance. Pakistan, India, and China, as well as other South Asian states such as Bangladesh have not allowed warship manoeuvres in their territorial waters. While arguing the significance of this claim as a regional custom, there are a range of things that can be added in favour of the discourse. Firstly, just as Norway had clarified their stance on delimitation rules, these states have clearly expressed their stance in requiring permission before conducting war manoeuvres in territorial waters as reservations to the UNCLOS. The South Asian states have collectively negotiated similar reservations matching in wording, language, and objective. Secondly, the South Asian states have adhered to this state practice as there has been no attempt by any of these states to violate this claim, just as Norway showed no contrary state practice. Moreover, the UNCLOS allows coastal states under the right to coastal defence to produce relevant laws and policies that regulate the territorial waters of a state. Hence, not only is this claim based in a legal right accepted by the UNCLOS, but it has been practiced over time without objections. Resultantly, the requirement of permission prior to war manoeuvres in territorial water has both state practice and *opinio juris* - elements necessary to establish a custom under Article 38 of the ICJ. Based on these facts, one can conclude that in addition to the privileges granted as signatories of the UNCLOS, the declarations and state practice of Pakistan, India, and China regarding the right to enact laws and policies for regulating territorial waters, including requirements of prior permission for conducting

²⁷⁰ Ibid

war manoeuvres in territorial waters, constitutes a regional custom under International Law.

4.2 Are U.S. FONOPs a Violation of International Law?

The issue of the legality of FONOPs can be analysed under two different lenses, rather, two different legal schools of thought. The first is what the late Oscar Schachter termed as the liberal approach to international law, where treaties are seen as a more refined instrument of international law in comparison to international customs.²⁷¹ The second and the more conservative approach is one that favours the traditional formulation of international customs.²⁷² This difference in approaches is important in light of the primary facts of the questions which are (a) the U.S. was involved in the treaty making process of the UNCLOS; (b) the U.S. has signed but not ratified the treaty; and (c) the U.S. conducts FONOPs citing customary provisions of the freedom of the high seas.

The liberal approach to international law places treaties above international customs. Having said that, one must be mindful of the fact that signing a treaty without ratifying it, as is the case with U.S. and UNCLOS, does not constitute binding obligations on the signatory.²⁷³ Therefore, the U.S. cannot be said to be bound by the provisions of UNCLOS. However, it could be argued that the UNCLOS supersedes the customary law of seas and freedom

²⁷¹ Bilder, R. B., Schachter, O., Charney, J. I., & Mendelson, M. "Disentangling Treaty and Customary International Law." *Proceedings of the Annual Meeting (American Society of International Law)*, 81, 157–164. <<http://www.jstor.org/stable/25658360>>

²⁷² Ibid

²⁷³ "The difference between signing and ratification" *The Government of Netherlands*, <<https://www.government.nl/topics/treaties/the-difference-between-signing-and-ratification>> accessed 02 October, 2021

of navigation, as the treaty is the codification of the relevant customary law. Even then, the fact that the U.S. has not ratified the treaty is a major stumbling block for the liberal approach, and this makes it difficult to declare FONOPs illegal as per international law.

The conservative approach to international places favours the creation of international customs through state practice. In the matter of U.S. FONOPs and UNCLOS, the United States leans on the customary freedom of navigation to challenge stances of states, including those of Pakistan, India, and China. Furthermore, as highlighted in Section 3.3 of this paper, the U.S. issues statements after conducting the FONOP to highlight its interpretation of the customary law of the sea. Although the UNCLOS authorizes states to take relevant legal and policy measures in territorial waters to ensure their security, the U.S.' non-signatory status to the UNCLOS means it is not bound by the requirement of taking prior permission before conducting war manoeuvres in the territorial waters of any of these states. However, considering that there is significant consensus and clarity expressed by Pakistan, India, and China, as well as other regional players such as Bangladesh and Iran with regards to requiring prior permission before conducting war manoeuvres in their territorial waters, we can argue that a regional custom exists in this regard. Unfortunately, this may be deemed insufficient in declaring U.S. FONOPs to be a violation of International Law. This is because the U.S., by virtue of statements and state practice, can argue that it has been a persistent objector in this regard. In such a scenario, it would not be bound by regional custom.

Another argument that might be made against the legality of U.S. FONOPs is that even some state outside South Asia have added reservations with regards to military manoeuvres in their territorial seas and exclusive economic

zone. However, this is also not sufficient to declare the U.S. FONOPs to be a violation of International Law. This is because the U.S. has been informally conducting these operations since the early 19th century.²⁷⁴ Furthermore, the program was institutionalised by the Carter administration in 1979, three years before the first ratification of UNCLOS.²⁷⁵ Hence, the U.S. has sufficient state practice on its side to give weight to its stance as a persistent objector. Keeping all these factors in mind, it is difficult to term the U.S. operations to be a violation of international law, irrespective of the fact that there is a regional custom against military manoeuvres in territorial waters and the exclusive economic zone in South Asia.

5. FUTURE OF FONOPs IN THE INDIAN OCEAN - GEOPOLITICAL IMPLICATIONS AND POLICY SUGGESTIONS FOR PAKISTAN

The United States has been conducting Freedom of Navigation Operations for over three decades. However, it was only in recent years that these operations started to garner a lot of attention.²⁷⁶ A major reason for this is the fact that for the best part of this time, the United States, due to the combination of being a regional hegemon and enjoying a unipolar moment following the fall of the Soviet Union, was perhaps the only country in the world to have the “freedom to roam.”²⁷⁷ However, as China’s economic growth has translated into military power, it started questioning U.S.

²⁷⁴ Mira Rapp-Hooper, “Freedom of Navigation in the South China Sea Is Business as Usual,” accessed October 21, 2021, <https://www.cnas.org/publications/commentary/freedom-of-navigation-in-the-south-china-sea-is-business-as-usual>.

²⁷⁵ Ibid

²⁷⁶ Odom, J.G, “How the U.S. FON Program is Lawful and Legitimate” (2015) Asia Maritime Transparency Initiative <<https://amti.csis.org/how-the-u-s-fon-program-is-lawful-and-legitimate/>> accessed September 18, 2021

²⁷⁷ Mearsheimer, J.J, “Can China Rise Peacefully” in *The Tragedy of Great Power Politics*, (Norton, 2014)

movements off its coast. For example, in October 2006, the U.S.S Kitty Hawk was taking part in a naval exercise in the East China Sea when suddenly, a Chinese submarine surfaced five miles from it.²⁷⁸ While there were some who argued that China's move was unnecessarily proactive, to many others, it was seen as a signal of China's desire to have the United States leave what it viewed as its backyard. Since then, China has also undertaken massive modernisation of its military. Based on the 2015 Chinese Military Strategy white paper, China views itself as a player in maintaining world peace and seeks to expand its presence beyond its coastal boundaries.²⁷⁹ Perhaps there is no greater evidence of this than the establishment of a Chinese Naval Base in Djibouti in 2017.²⁸⁰ Furthermore, China has secured control of the Hambantota Port in Sri Lanka,²⁸¹ and is likely to have a presence in Gwadar due to its close ties with Pakistan. To many observers, this confirms what is known in strategy circles as China's ambition of creating a "string of pearls" along the coastlines of the Indian Ocean.²⁸² In such a scenario, continued U.S. FONOPs in the Indian Ocean are likely to bring the People's Liberation Army Navy and the U.S. Navy face-to-face with one another, adding to the strategic tension and instability in the region. It should be added here that due to China's close ties with Pakistan as well as investment deals that have given

²⁷⁸ Gertz, B, "China sub stalked U.S. fleet," *The Washington Times*, (Washington D.C., November 13, 2006) < <https://www.washingtontimes.com/news/2006/nov/13/20061113-121539-3317r/>>
²⁷⁹ "China's Military Strategy," *The State Council, The People's Republic of China*, (2015) < http://english.www.gov.cn/archive/white_paper/2015/05/27/content_281475115610833.htm>

²⁸⁰ Chaziza, M. "China Consolidates its Commercial Foothold in Djibouti" *The Diplomat* (January 26, 2021) < <https://thediplomat.com/2021/01/china-consolidates-its-commercial-foothold-in-djibouti/>>

²⁸¹ Abi-Habib, M., "How China got Sri Lanka to Cough up a Port," *The New York Times* (June 25, 2018) < <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>>

²⁸² Ashraf, J., "String of Pearls and China's Strategic Culture," *Strategic Studies Vol. 37 No. 4* < <https://www.jstor.org/stable/48537578>>

it de-facto control of certain seaports in the Indian Ocean, its presence in the coastal waters of these states is unlikely to be a violation of the regional customs discussed in this paper.

In such a scenario, it is prudent that both China and the United States act in ways as to not increase the instability in the region. One of the ways this can be done is for the United States to ratify the UNCLOS. Doing so will reduce the risk of naval confrontations in the Indian Ocean, as well as give the United States a legal standing on which to counter what it views as China's revisionist desires.²⁸³ This is because the United States routinely criticises China for violating the UNCLOS, despite not being a member of the treaty.²⁸⁴

- As far as Pakistan is concerned, in addition to trying its best to not get caught between U.S. and Chinese struggle for dominance in the Indian Ocean, it should actively voice its position and concerns with regards to FONOPs in the Indian Ocean and especially in its own territorial waters. In researching this paper, the authors were disappointed to find the absence of Pakistan's stance on FONOPs in its territorial waters. The only time the Ministry of Foreign Affairs has spoken on the topic in the past few years was in response to a journalist's question, and that too in the context of Freedom of Navigation in the South China Sea.²⁸⁵

²⁸³ Malaver, E.N., "It is Time for the United States to Ratify UNCLOS," *U.S. Naval Institute* (June 2021) <<https://www.usni.org/magazines/proceedings/2021/june/it-time-united-states-ratify-unclos>>

²⁸⁴ Schrepferman, W., "Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea," *Harvard International Review*, (October 31, 2019) <https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/>

²⁸⁵ "Record of the Press Briefing by Spokesperson on 24 March 2016," *Ministry of Foreign Affairs, Government of Pakistan*, (March 24th, 2016) <<https://mofa.gov.pk/record-of-the-press-briefing-by-spokesperson-on-24-march-2016/>>

"Question

How does Pakistan view rising tension in South China Sea particularly between United

Unfortunately, Pakistan's failure to put its stance forward in this matter is a microcosm of what seems to be the State's overall apathy to adopting a legal approach in advancing its geopolitical and strategic interests. In an era where the statements and declarations made by states carry weight on legal and multinational forums, Pakistan must repeatedly voice its concerns and share its position every time the U.S. conducts a FONOP in Pakistan's territorial waters, or the territorial waters of neighbouring states who have attached similar declarations to the UNCLOS. It would not be unwise to suggest that in this case, other countries should be encouraged to do the same. While these statements are unlikely to deter the U.S. from carrying out FONOPs in the future, it will give credence to the establishment of a regional custom, which can then be used to brand U.S. FONOPs to be in violation of International Law.

States and China? Do you think this rising tension will affect CPEC project between China and Pakistan since it is ambitious program between the two countries? (Shaukat Paracha – Aaj TV)

Answer

I have stated our principled position regarding South China Sea on a number of occasions. Pakistan advocates that maintenance of peace and security is the collective responsibility of all parties to the South China Sea. Matters of sovereignty and territorial disputes should be resolved through peaceful means without resorting to use of force.

Pakistan urges all parties to exercise restraint with a view to creating a positive climate for the eventual resolution of all contentious issues with due respect to universally recognized principles of international law and maintain freedom of navigation and over-flight in the South China Sea.”